Supreme Court, U. S.
FILED
SEP 6 1974
MICHAEL RODAK, JR., CLERK

No. 73-662

In the Supreme Court of the United States

OCTOBER TERM, 1974

JAMES R. SCHLESINGER, ET AL., PETITIONERS

v.

BRUCE R. COUNCILMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS ON THE MERITS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 9–13) is reported at 481 F.2d 613. The initial opinion of the district court (Pet. App. C, pp. 15–18) and its opinion on rehearing (Pet. App. D, pp. 19–22) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 14) was entered on July 19, 1973. The petition for a writ of certiorari was filed on October 16, 1973, and was granted on December 17, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

The relevant facts are set forth at pp. 2–5 of our Brief on the Jurisdictional Issues. They show that Councilman, a Captain in the Army, was charged with possessing marijuana at his off-base apartment and with selling marijuana to an undercover Army investigator, whom he believed to be an enlisted man from his post.

INTRODUCTION AND SUMMARY OF ARGUMENT

The sale and transfer of marijuana by an Army officer to an Army enlisted man off post and the possession of marijuana off post by the officer are offenses that are "service-connected" and hence within military court-martial jurisdiction under *O'Callahan* v. *Parker*, 395 U.S. 258. The court of appeals' ruling to the contrary rests upon a misapprehension of *O'Callahan's* rationale.

This Court, in *Relford* v. *Commandant*, 401 U.S. 355, enunciated criteria by which service-connection may be judged. The court of appeals erred in treating these factors as a complete and final codification of the *O'Callahan* rationale. Applying the criteria mechanically, without regard to other applications of their unifying theme, the court concluded that respondent Councilman was not subject to court-martial jurisdiction. We will show that the court of appeals ignored *Relford* criteria that establish court-martial jurisdiction over respondent.

More important, however, it is the rationale of *O'Callahan* that must govern this case. That rationale, and not specific applications mentioned in other cases,

gives meaning to the service-connection issue. The *Relford* opinion explicitly recognized that this Court had not attempted a closed list of criteria, that the application of the service-connection test to the facts of each case must be *ad hoc*, and, further, that the criteria mentioned do not exhaust the law's capacity for growth:

> We recognize that any *ad hoc* approach leaves outer boundaries undetermined. *O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time. [401 U.S. at 369.]

The term "service-connection" itself implies the "area * * * where the court-martial is appropriate and permissible." This area is defined by the need of the military, recognized by the Constitution, for a justice system that reinforces the discipline and morale required in an effective fighting force. As the *O'Callahan* opinion put it:

> The Constitution gives Congress power to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14, and it recognizes that the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply. [395 U.S. at 261.]

It seems apparent that the rationale of service-connection is thus the same as the rationale of Article 134, 10 U.S.C. 934, under which Captain Councilman is charged, and which prohibits in pertinent part: "all disorders and neglects to the prejudice of good order and discipline in the armed forces * * *." Both terms—the jurisdictional and the substantive—are given meaning by the unique nature and special needs of the military. Cf. *Parker* v. *Levy*, No. 73-206, decided June 19, 1974, slip op. 8-17.

There is, of course, no way to codify completely the factors that show service-connection, any more than the military have found it possible to codify all the disorders and neglects that prejudice good order and discipline in the armed forces. *O'Callahan* and *Relford* cite factors that provide guidance for one, just as the offenses listed in the *Manual for Courts-Martial* (1969) assist in illuminating the other. But it is plain that the rationale of both is the bearing of the offense in question on the discipline, morale, and effectiveness of fighting forces.

Measured by that standard, we submit, the service-connection of the offenses charged against Captain Councilman is clear beyond peradventure. Service-connection here exists in each of two ways.

1. The first two offenses with which Captain Councilman is charged are the sale and the transfer of marijuana to an enlisted man. Though these offenses occurred off-base and neither man was in uniform, Councilman knew that his drug transactions were with an enlisted man and must certainly have known that such unlawful dealings between officers

and enlisted men tend to impair discipline and morale in the Army. It certainly does not matter that the enlisted man, Skaggs, was in fact an undercover agent and hence not a "victim" any more than in a civilian prosecution it would matter that a drug sale was made to a plainclothes policeman who did not intend to use the drug. Moreover, the impact of such an unlawful transaction goes far beyond the particular enlisted man who purchases the drug. Councilman knew that his status as an officer was known to Skaggs, and it is apparent that, in the tightly-knit, rumor-prone society of the military, word will usually circulate among the enlisted ranks concerning an officers' participation in such unlawfulness.

Civilian prosecution is not adequate to the needs of the military in such cases. Laws, probabilities of prosecution, and severity of punishment vary widely with respect to drug offenses among the States and within the States. This factor, while not itself perhaps sufficient to show service-connection, is certainly entitled to weight when the conduct is prejudicial to discipline and morale so that uniformity of treatment is in itself an important value in maintaining discipline and morale.

2. The third charge against Captain Councilman, possession of marijuana, is also service-connected. There is some difference of opinion between federal district courts and courts of appeals and the Court of Military Appeals as to the service-connection of off-post possession of drugs. The Court of Military Appeals, though it has been discriminating and care-

ful in its approach and has not found all drug offenses to be service-connected, has upheld court-martial jurisdiction more often than the purely civilian courts. The Court of Military Appeals, though manned by civilian judges, was established to specialize in military offenses and its expertise is entitled to weight in judging the relationship of particular offenses to the special and legitimate interests of the military.

It is, in any event, clear that possession of marijuana and other proscribed drugs, whether offbase or on, is properly held service-connected. The effects of drug use are deleterious to mental and physical performance. Certainly, the military think so, there is much evidence to that effect, and it is an allowable judgment with which the judiciary ought not to interfere. The number of drug offenses involving military personnel has increased rapidly in recent years, paralleling the experience of civilian society. Whatever one's views of permissiveness in these matters in civilian life, the military cannot adopt a permissive attitude and remain efficient. If some States decriminalize marijuana use, and if its off-base possession were held not service-connected, the military would suffer not merely from lack of uniformity of treatment but from lowered effectiveness in units stationed in the permissive States. That fact alone shows how important it is that drug possession be held service-connected. There are offenses, and this is one, which civilian jurisdictions may or may not choose to tolerate, but which the armed forces cannot, consistently with their obligations to the nation, afford to overlook.

In *Parker* v. *Levy, supra,* this Court set forth the rationale for military jurisdiction in this case.

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. * * * The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or to be ready to fight wars should the occasion arise." * * * [W]e [have] noted * * * that "the rights of men in the armed forces must perforce be conditioned to certain overriding demands of discipline and duty * * *." [Slip op at 8–9.]

In this context, an offense is properly service-connected if it threatens to undermine the discipline and duty which this Court has recognized as essential to the armed forces.

ARGUMENT

I

DRUG TRAFFICKING BETWEEN AN OFFICER AND AN ENLISTED MAN IS SERVICE-CONNECTED BECAUSE SUCH OFFENSES ARE SEVERELY DETRIMENTAL TO THE DISCIPLINE AND EFFECTIVENESS OF THE ARMED FORCES OF THE UNITED STATES

1. It seems obvious that the requisite relationship of command and obedience between an officer and an enlisted man would be destroyed by criminal dealings between them. An enlisted man can hardly have the proper respect for an officer who has been selling him drugs, nor could an officer maintain the proper command relation to his accomplice in crime. This is only

an obvious concomitant of the long-standing military custom that officers must never behave improperly in the presence of enlisted men.[1] Indeed, even fraternization between officers and enlisted personnel has historically been discouraged by the American military as well as the armed forces of other nations.

The reason for this policy is the apprehension that personal relationships between an officer and his subordinates may interfere with the proper execution of military command. As *The Officer's Guide* (an unofficial, but widely respected, publication) explains (Stackpole Press, 1968–1969 ed., at 17–18):

> The relationship between a commander and his men must be developed to stand the strains of campaign and combat, as well as the less demanding conditions at posts and stations in the United States. There is no precise parallel with other vocations as to this total responsibility, against which to evaluate the need for unusually high standards of conduct, including abstentions. * * *
>
> [I]t is strong tradition that an officer does not gamble, nor borrow money, nor drink intoxicants, nor participate in ordinary social associations with enlisted men on an individual basis. Aggravated violations of the tradition may be handled under the Uniform Code of Military Justice. * * *

[1] Winthrop gives as an example of "conduct unbecoming an officer and a gentleman" the offense of "[d]runkenness of a gross character committed in the presence of military inferiors." *Military Law and Precedents*, p. 717 (2d ed., 1920 reprint).

> Even the suspicion of favoritism must be avoided. If an officer has social companions, obvious favorites, or "buddies," among his soldiers, and then sponsors one or more of them for promotion, a preferred assignment, or exemption from duty of special hardship or hazard, he destroys in the all-seeing eyes of others the essential standard of mutual trust and respect.

How much more true this must be of an officer dealing drugs to enlisted men from his own post. See also, *United States* v. *Priest*, 21 U.S.C.M.A. 564, 570.

This well-known rule obviously responds to experience that discipline is harder to maintain when military subordinates come to be on familiar terms with those who must give them orders and who must expect obedience often without the possibility of argument or explanation. Familiarity leading to contempt must be avoided but is never more certain to occur than when an officer participates with an enlisted man in a criminal transaction.

2. The effect of Captain Councilman's conduct on military discipline goes far beyond the two persons directly involved. In a closely-knit military society, criminal or scandalous behavior by an officer with an enlisted man is likely to become widely known, decreasing respect not only for Councilman among the men under his command but decreasing it as well for all officers. It is well known that no officer can maintain discipline if those around him do not. An offense which is thus "to the prejudice of good order and discipline in the armed forces," in the language of

Article 134, is exactly the type of "service-connected" offense over which the military must have jurisdiction.

This Court, in *Parker* v. *Levy, supra,* recognized (slip op. at 9):

> that a military officer holds a particular position of responsibility and command in the armed forces:
>
> "The * * * President's commission * * * recites that 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee he is named to a specified rank during the pleasure of the President." *Orloff* v. *Willoughby* * * *, 345 U.S., at 91.

In order to maintain discipline, an officer must preserve the trust which that commission places in him.

3. The special needs of the military cannot be met solely by civilian prosecution of offenses. If civilian courts could vindicate vital military interests, there would be no occasion for court-martial jurisdiction over any offense. The necessity for military jurisdiction is particularly apparent where, as here, civilian prosecutors and courts vary widely in the seriousness with which they view the offense, some imposing much heavier penalties and some virtually ignoring it, and none of them giving any consideration to the effect upon discipline and morale which is the greatest concern of the military. The military needs to maintain a single standard of discipline, but state policies on drug offenses vary widely. The identical offense might bring a multi-year sentence in one state while being ignored or resulting only in a small fine in another. It would be fair neither to the soldier nor to the service to leave the demands of discipline to the vagaries of state law enforcement.

Were it necessary to relate service-connection with particular factors mentioned in *Relford,* we could mention those such as "The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order" (401 U.S. at 367); "The distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community" (*id.* at 367–368); and "The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as * * * military relationships have important contrary significance" (*id.* at 368). But we submit that the criminal transaction here, between an officer and an enlisted man, is so obviously related to the military's legitimate and unique concern with discipline and morale, and thus so obviously service-connected within the rationale of *O'Callahan* and *Relford* that it would serve no purpose to try to multiply instances of *Relford* criteria applicable here.

II

OFFENSES INVOLVING DRUG POSSESSION ARE SERVICE-CONNECTED BECAUSE THEY THREATEN THE DISCIPLINE AND EFFECTIVENESS OF THE ARMED FORCES.

1. In order to fulfill its mission, the military must have soldiers who are physically and mentally equipped to undertake their duties. The effects of drug use are such that the armed services may properly regard any use as threatening the discipline and effec-

tiveness of the user. This judgment has been confirmed on several occasions by the Court of Military Appeals, "the court to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad." *Noyd* v. *Bond*, 395 U.S. 683, 695.

Thus in *United States* v. *Beeker*, 18 U.S.C.M.A. 563, 565, the court held that "use of marihuana and narcotics by military persons on or off a military base has special military significance" in light of the "disastrous effects" of these substances "on the health, morale and fitness for duty of persons in the armed forces." The court also concluded that, "[a]s with the case of use of marihuana, the possession of marihuana by military persons is a matter of immediate and direct concern to the military as an act intimately concerned with prejudice to good order and discipline or to the discredit of the armed forces" (18 U.S.C.M.A. at 565). Accord *United States* v. *DeRonde*, 18 U.S.C.M.A. 575; *United States* v. *Castro*, 18 U.S.C.M.A. 598, 600; *United States* v. *Boyd*, 18 U.S.C.M.A. 581; *United States* v. *Adams*, 19 U.S.C.M.A. 75. Possession, particularly in the amounts involved here, is, quite obviously, indicative of use and is equally forbidden. The court's rationale is thus based squarely on legitimate military interests. If drug use by a serviceman affects his subsequent fitness for duty, the military can scarcely fail to be concerned about possession as well as use.

It should be noted that the Court of Military Appeals has strictly limited the reach of court-martial

jurisdiction to exclude drug offenses which do not imply use of drugs by a serviceman. Thus, sales of marijuana and LSD off post by a serviceman to a *civilian* have been held not to be service-connected (*United States* v. *Morley*, 20 U.S.C.M.A. 179; cf. *United States* v. *Pieragowski*, 19 U.S.C.M.A. 508); but the court has held delivery of prohibited drugs from one serviceman to another, whether on or off base, to be as service-connected as possession because the delivery "serve[s] as a conduit for the unlawful possession of another. The deleterious effect on the health, morale, and fitness for duty of persons in the armed forces is the same." *United States* v. *Rose*, 19 U.S.C.M.A. 3, 4.[2]

In holding that these off-post drug offenses directly affect military discipline, the military courts, of course, are acting within their area of special competence. This Court has recognized that determinations of whether conduct prejudices "good order and military discipline" are "the very matter that falls within the province of courts-martial, and in respect to which their conclusions cannot be controlled or reviewed by the civil courts." *Swaim* v. *United States*, 165 U.S. 553, 562. See also *Smith* v. *Whitney*, 116 U.S. 167, 178; *Dynes* v. *Hoover*, 20 How. 65, 79.

[2] An additional rationale underlying the court's distinction between delivery to another serviceman and to a civilian is that the military has a special interest—which local civilian authorities may not fully vindicate—when the accused and the victim (or participant) are active duty servicemen. Cf. *United States* v. *Rego*, 19 U.S.C.M.A. 9; *United States* v. *Cook*, 19 U.S.C.M.A. 13.

The military courts, including the Court of Military Appeals, have special competence not only to evaluate violations of military order, but also to decide what dispositions of particular cases will best meet the practical needs of the armed forces in maintaining discipline.[3] For these reasons their decisions with regard to disciplinary problems are entitled to deference from the civil courts.

The court of appeals in the instant case, however, has taken the position, contrary to that of the Court of Military Appeals, that off-base possession of marijuana and transfer to another serviceman are not of sufficient military significance to be service connected.[4]

[3] See Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962).

[4] The civil courts have generally concluded that, in light of *O'Callahan* and *Relford*, an on-base narcotics violation is an offense cognizable by court-martial. *Diorio* v. *McBride*, 431 F. 2d 730 (C.A. 5) (on-post use and possession of marijuana); *Messina* v. *Commanding Officer*, 342 F. Supp. 1330 (S.D. Cal.) (sale of marijuana and hashish by servicemen aboard Naval Weapons Center).

With respect to off-post narcotics offenses, however, a number of civil courts have held that certain off-post drug offenses are not service-connected. The Fifth Circuit has held that the use of marijuana by a serviceman off post and off duty is not service connected. *Cole* v. *Laird*, 468 F. 2d 829. A number of district courts have reached similar conclusions with regard to marijuana and other drugs. *E.g.*, *Moylan* v. *Laird*, 305 F. Supp. 551 (D. R.I.); *Lyle* v. *Kincaid*, 344 F. Supp. 223 (M.D. Fla.); *Schroth* v. *Warner*, 353 F. Supp. 1032 (D. Hawaii); *Redmond* v. *Warner*, 355 F. Supp. 812 (D. Hawaii). (A few of these decisions, *e.g.*, *Moylan* and *Lyle*, *supra*, have indicated that a serviceman's *use* of marijuana—as distinguished from possession—even if off base and off duty, might have special military significance.)

Some civil courts, on the other hand, have held that the military does have jurisdiction over certain off-post drug

In reaching that conclusion, the court has seriously underestimated the threat to military discipline, morale, and effectiveness in the use of prohibited drugs, including marijuana, by servicemen on active duty.

2. The fact is that drug abuse is a far more serious problem in the military context than in civilian life. That is not, of course, because drugs—marijuana or any other prohibited drug—affect a soldier more than a civilian. Rather, the difference is that the effects—on discipline, morale and effectiveness—matter less in non-military activities. Indeed, even if civilian jurisdictions were to lift their criminal sanctions against marijuana smoking, the case for continuing the military prohibition would be unaffected. The military concern is discrete, and the propriety of treating drug use as a military offense ought not be prejudiced by the coincidence that it is also criminally punished in most civilian jurisdictions.

The point is illustrated by considering the long-standing military rule with respect to liquor. Winthrop notes:

> [S]imple drunkenness is in general a military offence in violation of [the General] Arti-

offenses. See, *e.g.*, *Scott* v. *Schlesinger*, No. C.A. 4-2371 (N.D. Tex., Oct. 1, 1973) (off-post sales of marijuana and LSD to servicemen); *Herrin* v. *Richardson*, No. C.A. 120-73-A (E.D. Va., Oct. 17, 1973) (off-post possession and use of marijuana, between watch assignments, by servicemen who had contact with classified material); *Peterson* v. *Goodwin*, No. C.A. EP-73-105 (W.D. Tex., Aug. 22, 1973) and *Walden* v. *McLucas*, C.A. No. 3-2892 (E.D. Cal., Dec. 21, 1973) (off-base possession of narcotics, including heroin, and distribution to another serviceman).

> cle * * *. Hough [on *Courts-Martial,* 1825] remarks that— "* * * drunkenness constitutes of itself a breach of military discipline." * * * Gen. Crook well observes: "Drunkenness by persons in the military service is an offence against good order and military discipline whenever and wherever it occurs." [*Military Law and Precedents, supra,* at 722–723.]

And the Court of Military Appeals has stated: "in the military sphere, drunkenness in the privacy of one's own quarters is a punishable offense. Manual for Courts-Martial, * * * ¶ 127c, p.age 225." *United States* v. *Lowe,* 4 U.S.C.M.A. 654, 658.

These considerations apply with added force to drug use. The military, just as most civilian jurisdictions, has determined that use of drugs is even more harmful than use of alcohol. Thus, simple possession or use of alcohol is not made an offense under the military law unless alcohol consumption proceeds to the stage where drunkenness impairs fitness for duty. The military, like most civilian authorities in the United States and in the world, regards drug use, on the other hand, as intrinsically harmful to the individual and hence prejudicial to the military's claim to his effective services. This is certainly an allowable judgment, supported by evidence and experience, and courts ought not to undertake to revise it or to deny the connection between drug use and service ineffectiveness.

3. The case might be different if we were dealing with a rare and peripheral occurrence which the military might be content to leave to civilian control. But

the reality is otherwise. Drug abuse is a serious *military* problem partly because of its huge dimensions. Many thousands of instances obviously have a cumulative impact, which legitimately invokes military concern. So, also, the practical difficulties of effectively dealing with so many infractions through civilian courts bears on the appropriateness of military jurisdiction.

The number of cases of drug abuse requiring investigation has risen dramatically in recent years. Such cases involving narcotics rose from 521 in 1966 to 3,401 in 1970. For marijuana cases the increase in the same period was from 3,096 to 26,902. For other non-narcotic drugs the increase was from 917 to 7,541. Hearings before the Subcom. on Alcoholism and Narcotics of the Senate Committee on Labor and Public Welfare, on Military Drug Aubse, 1971, 92d Cong., 1st Sess., pp. 120–127.

To combat this problem, the armed forces have embarked on ambitious programs of drug and alcohol abuse prevention and control. See Department of Army Circular 600–85. These programs have been made a top priority of field commanders and have occupied increasing time and energy of the military. The budget for such programs in fiscal year 1974 was more than $70 million. Hearing before the Subcommittee on Drug Abuse in the Military Services of the Senate Committee on Armed Services, on Review of Military Drug and Alcohol Programs, 93d Cong., 1st Sess., p. 110. More than 86,000 servicemen underwent some type of rehabilitation for drug abuse in fiscal years 1972 and 1973, and only 52 percent of these

were able to return to duty after rehabilitation. *Id.* at 109.

Cases warranting punishment are also at a high level. We are informed by the Department of Defense that in 1972 the Army alone imposed 4,186 non-judicial punishments and held 2,065 courts-martial for drug-related offenses. In 1973 the comparable figures were 9,890 and 2,637, increases of over 130 per cent and 20 percent, respectively, in just one year.

Moreover, much of this problem originates off base. Of course, virtually all prohibited drugs must originate outside the post area, and they will often be the subject of trafficking in the surrounding community. We are also informed by the Department of Defense that during the period July–September 1973, there were 2,954 drug offenses involving Army personnel reported to the Military Police, of which 27 percent took place off base.

As these figures show, there can be no neat division of the drug problem between on-base and off-base use. As the Court of Military Appeals noted in *Rainville* v. *Lee*, 22 U.S.C.M.A. 464, 465, drug use anywhere adversely affects the "plain obligation of our armed forces to maintain * * * the capacity of all service personnel to function as an effective force." In order to fulfill that obligation, the armed services must be able to deal with conditions that damage that capacity, wherever they occur. The services may legitimately make the judgment that off-base drug offenses are an integral part of the threat to good order and discipline posed by soldiers who use drugs and thus are subject to military jurisdiction.

In summary, both Councilman's status as an officer and the detrimental effect of drug use on military effectiveness disprove the court of appeals' unwarranted assertion that the crime here charged "affects military discipline no more than the commission of any crime by any serviceman" (Pet. App. A, p. 13).[5]

CONCLUSION

It is, therefore, respectfully submitted that the decision of the court of appeals should be reversed.

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SEPTEMBER 1974.

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[5] Contrary to the court of appeals' suggestion (Pet. App. A, pp. 9–11), the impact of these offenses is not diminished because the drug purchaser here was an undercover agent rather than, as Councilman believed, an enlisted man from his own post. Undercover agents may legitimately be used to detect crimes, and are almost a necessity in drug investigations. Defendants cannot reasonably argue that transfer of drugs to agents posing as partners in crime should be judged as "victimless" conduct. See *United States* v. *Russell*, 411 U.S. 423, 432–436. Accordingly, for the purposes of this case, we must view the drug purchaser, as did Councilman, as an enlisted man from Fort Sill obtaining drugs for his own use. The contrary position would wholly eliminate the use of undercover agents, on or off base, in the effort to punish and deter drug abuse.

U.S. GOVERNMENT PRINTING OFFICE: